A

Golden Approach Sdn Bhd v Lau Sen Leong & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(IM)(NCVC)-105–03 OF 2018
NALLINI PATHMANATHAN, BADARIAH SAHAMID AND ZABARIAH YUSOF JJCA
11 JANUARY 2019

C

Contract — Breach — Limitation — Late delivery of vacant possession — Respondents sued for liquidated and ascertained damages — Respondents filed summary judgment — Date of the accrual of right to sue for liquidated and ascertained damages — Whether cause of action only accrued at the time when respondent took over vacant possession of property — Whether respondents' claim against the appellant time-barred — Limitation Act 1953 s 6(1) — Rules of Court 2012 O 14 & O 14A

D

E

Limitation — Accrual of cause of action — Breach of contract — Late delivery of vacant possession — Date of accrual of right to sue for liquidated and ascertained damages — Whether cause of action only accrued at the time when respondent took over vacant possession of property — Whether the respondents' claim against appellant time-barred — Limitation Act 1953 s 6(1)

F

Vide a sale and purchase agreement ('the SPA'), Lau Sen Leong ('the first respondent') and Lau Kim Swee ('the deceased') had purchase a property from Golden Approach Sdn Bhd ('the appellant'). It was stated in cl 20 of the SPA that the vacant possession of the property ought to be handed over to the first respondent and the deceased within 36 calendar months from the date of the

G

SPA. There had been a delay from 3 August 1998–14 March 2016 on the part of the appellant in delivering the vacant possession of the property. Consequently, the first respondent and the administrators of the estate of the deceased ('the second respondents') had filed an action against the appellant for liquidated damages in the sum of RM411,456. The respondents then filed an

H

application for summary judgment under O 14 r 1 of the Rules of Court 2012 ('the ROC'). The learned sessions court judge had allowed summary judgment by the respondents to be entered against the appellant. The learned sessions court judge held, inter alia, that in determining when the right to sue accrued, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 ('Insun') was

I

distinguished. The High Court judge had dismissed the appellant's appeal and affirmed the decision of the sessions court judge, hence, the present appeal. The crux of the case was the date of the accrual of the right to sue for the liquidated and ascertained damages. The respondents submitted that the cause of action only accrued at the time when the respondents took over vacant possession of

the property, namely on 14 March 2016. The appellant on the other hand submitted that the cause of action accrued at the time when the breach occurred, namely on 3 August 2004. Therefore, by filing the suit against the appellant on 15 March 2017, clearly the respondents' action was out of time pursuant to s 6(1) of the Limitation Act 1953 ('the Act'). The issue for the court's determination was whether the respondents' claim against the appellant, was barred by s 6(1) of the Act.

Held, setting aside the summary judgment, allowing the appeal with costs of RM10,000, and striking out the claim:

(1) The principle in determining when the cause of action accrued as set out in Insun's case was applicable. Both of the SPAs in *Insun* and this present appeal were in the form as prescribed by the Housing Development (Control and Licensing) Regulations which were enforced at the material time. The sessions judge and the learned High Court judge had erred when they had distinguished the SPA in the present appeal with *Insun*'s case based on the presence of the addendum in cl 20(2) of the SPA which was absent in cl 18(2) of the SPA in the *Insun*'s case and submitted that the principle as laid down in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 was applicable. The court found that the addendum was not material and neither was it crucial to the extent that it affected or altered the meaning of the clause in the SPA concerned. What needed to be considered was the obvious and most material difference between the two SPAs (see paras 27 & 29–31).

(2) The second ground relied upon by the learned High Court judge to distinguish *Insun* and this present appeal was that the purchasers in our present appeal had pursued vigorously against the appellant to hand deliver and hand over vacant possession of the property. The purchasers submitted that they had conformed with s 56(3) of the Contracts Act 1950. The court found that this section was immaterial and ought not be a basis of distinguishing the case with *Insun* and neither could it be a basis to extend the time as stipulated under the Act (see para 32).

(3) Thirdly, the respondents submitted that they would not be able to calculate liquidated damages if they proceeded in filing their claim at the time of breach on 4 August 1998. In other words, the contention of the respondents was that the cause of action would not be complete until the property was actually completed and vacant possession given to the respondents. However, the court found that it would not be correct to say that the cause of action would shift because they could not calculate liquidated damages if they were to file their claim at the time of breach, as there was no delivery at the time of breach. The issue on hand was when the cause of action accrued and it ought not be confused with the reliefs claimed (see para 33).

(4) *Insun*'s case applied and the respondents' right of action to claim for liquidated and ascertained damages accrued on the date of the breach, namely the day after the time limited under cl 20(2) of the SPA of delivery of vacant possession on 4 August 1998. As the respondents' cause of action was founded on contract, the limitation period was governed by s 6 of the Act, which was six years from the date of the breach. The last date for the respondents to bring an action against the appellant for the breach of cl 20(2) of the SPA was 3 August 2004. Clearly, the action herein was filed on 15 March 2017 which was outside the limitation period as prescribed under s 6(1) of the Act. Hence, the respondents' claim was out of time (see paras 35–36).

(5) The learned judge had erred in distinguishing *Insun*'s case with the present appeal. The present SPA was similar to the one in *Insun*'s case. Therefore, as limitation had set in, the respondents were not entitled to summary judgment. The summary judgment was therefore set aside. In view that the court had allowed the appeal, and the claim was barred by limitation, there was therefore nothing left for the matter to be remitted back to the High Court. The court had then invoked its powers under O 14A of the ROC and ordered that the claim be struck out (see paras 37 & 39).

[Bahasa Malaysia summary

Melalui perjanjian jual beli ('PJB tersebut'), Lau Sen Leong ('responden pertama') and Lau Kim Swee ('si mati') telah membeli hartanah daripada Golden Approach Sdn Bhd ('perayu'). Dinyatakan di dalam klausa 20 PJB tersebut bahawa milikan kosong hartanah tersebut sepatutnya diserahkan kepada responden pertama dan si mati dalam 36 bulan kalendar daripada tarikh PJB. Terdapat penangguhan daripada 3 Ogos 1998–14 Mac 2016 pada bahagian perayu dalam memberikan milikan kosong hartanah. Sebagai akibatnya, responden pertama dan pentadbir-pentadbir estet si mati ('responden-responden kedua tersebut') telah memfailkan tindakan terhadap perayu untuk ganti rugi boleh dibubarkan dalam jumlah RM411,456. Responden-responden kemudiannya memfailkan permohonan untuk penghakiman terus di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Hakim mahkamah sesyen yang terpelajar telah membenarkan penghakiman terus oleh responden-responden untuk dimasukkan terhadap perayu. Hakim mahkamah sesyen terpelajar memutuskan, antara lainnya, bahawa dalam memutuskan bila hak untuk menyaman terjadi, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 ('Insun') telah dibezakan. Hakim Mahkamah Tinggi tidak membenarkan rayuan perayu dan memihak kepada keputusan mahkamah sesyen, oleh itu, rayuan ini didengar. Hal penting kes adalah tarikh mulanya hak untuk menyaman untuk ganti rugi yang boleh dibubarkan dan tidak boleh dibubarkan. Responden-responden menghujahkan bahawa punca tindakan hanya terhasil apabila

responden-responden mengambil alih milikan kosong hartanah, iaitu pada 14 Mac 2016. Perayu sementara itu menghujahkan bahawa punca tindakan terjadi semasa pengingkaran terjadi, iaitu pada 3 Ogos 2004. Oleh itu, dengan memfailkan saman ini terhadap perayu pada 15 Mac 2017, jelaslah bahawa tindakan responden-responden berada di luar jangka masa menurut s 6(1) Akta Had Masa 1953 ('Akta tersebut'). Isu keputusan mahkamah adalah sama ada tuntutan responden terhadap perayu dihalang oleh s 6(1) Akta tersebut.

Diputuskan, penghakiman terus diketepikan, rayuan dibenarkan dengan kos sebanyak RM10,000, dan tuntutan ditolak:

(1) Prinsip dalam memutuskan bila punca tindakan bermula sebagaimana dinyatakan di dalam kes *Insun* adalah terpakai. Kedua-dua PJB di dalam *Insun* dan rayuan kini adalah dalam bentuk seperti mana yang dinyatakan oleh Regulasi Pembangunan Rumah (Kawalan dan Pelesenan) yang berkuat kuasa pada waktu yang material. Hakim mahkamah sesyen dan hakim Mahkamah Tinggi telah terkhilaf apabila telah membezakan PJB di dalam rayuan kini dengan kes *Insun* berdasarkan addendum di klausa 20(2) PJB yang tiada di dalam cl 18(2) SPA di dalam kes *Insun* dan menghujahkan bahawa prinsipal yang dinyatakan di *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 adalah terpakai. Mahkamah menjumpai addendum adalah tidak material dan tidak penting sehingga ia memberi kesan atau mengubah maksud klausa dalam PJB yang terlibat. Apa yang perlu dipertimbangkan adalah yang terjelas dan paling mempunyai perbezaan material antara kedua-dua PJB (lihat perenggan 27 & 29–31).

(2) Asas kedua yang disandarkan oleh hakim Mahkamah Tinggi yang terpelajar untuk membezakan *Insun* dan rayuan kini adalah pembeli-pembeli di dalam rayuan kini telah mendesak perayu untuk menyerahkan dan memberikan milikan penuh hartanah. Pembeli-pembeli menghujahkan bahawa mereka telah mengikut s 56(3) Akta Kontrak 1950. Mahkamah memutuskan bahawa seksyen ini tidak material dan tidak patut menjadi asas untuk membezakan kes dengan *Insun* dan tidak boleh menjadi asas untuk memanjangkan masa sepertimana yang dinyatakan dalam Akta tersebut (lihat perenggan 32).

(3) Ketiganya, responden-responden menghujahkan bahawa mereka tidak akan dapat untuk mengira ganti rugi boleh dibubarkan jikalau mereka terus memfailkan tuntutan pada masa pengingkaran pada 4 Ogos 1998. Dalam kata lain, penyataan responden-responden adalah punca tindakan tidak akan siap sehingga hartanah sememangnya siap dan milikan kosong diberikan kepada responden-responden. Walau bagaimanapun, mahkamah memutuskan bahawa ia tidak tepat untuk menyatakan bahawa punca tindakan akan berubah kerana mereka tidak boleh mengira ganti rugi yang boleh dibubarkan jikalau mereka memfailkan

tuntutan pada masa keingkaran, kerana tiada penghantaran semasa pengingkaran. Isu sekarang adalah bila punca tindakan bermula dan sepatutnya tidak dikelirukan dengan relif-relif yang dituntut (lihat perenggan 33).

(4) Kes *Insun* terpakai dan hak responden-responden untuk menuntut ganti rugi yang tidak boleh dibubarkan dan boleh dibubarkan terjadi semasa tarikh pengingkaran, iaitu hari selepas had masa di bawah klausa 20(2) PJB tersebut oleh penghantaran milikan kosong pada 4 Ogos 1998. Memandangkan punca tindakan responden berasakan kontrak, tempoh had masa tertakluk kepada s 6 Akta tersebut, yang mana adalah enam tahun daripada tarikh pengingkaran. Tarikh akhir untuk responden-responden memulakan tindakan terhadap perayu untuk pengingkaran klausa 20(2) PJB adalah pada 3 Ogos 2004. Jelaslah bahawa tindakan ini difailkan pada 15 Mac 2017 yang mana adalah luar daripada hak masa seperti mana yang dinyatakan di bawah s 6(1) Akta tersebut. Oleh itu, tuntutan responden adalah diluar jangka masa (lihat perenggan 35–36).

(5) Hakim yang terpelajar telah terkhilaf dalam membezakan kes *Insun*'s dengan rayuan kini. PJB kini adalah sama dengan kes *Insun*. Oleh itu, memandangkan had masa telah terpakai, responden-responden tidak berhak untuk penghakiman terus. Penghakiman terus oleh itu diketepikan. Memandangkan mahkamah telah membenarkan rayuan dan tuntutan telah diberhentikan oleh had masa, tiada apa yang tinggal untuk perkara ini dibawa semula ke Mahkamah Tinggi. Mahkamah dengan ini menggunakan kuasanya di bawah A 14A KKM dan memutuskan bahawa tuntutan untuk ditolak (lihat perenggan 37 & 39).]

Notes

For cases on breach of contract, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2326–2327.

For cases on limitation, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3942–3944.

Cases referred to

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188; [1996] 2 CLJ 753, FC (folld)

Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (distd)

Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1984] 2 MLJ 280, FC (refd)

Legislation referred to

Contracts Act 1950 s 56(3)
Housing Developers (Control and Licensing) Regulations 1982 (repealed by the Housing Developers (Control and Licensing) Regulations 1989)
Housing Developers (Control and Licensing) Rules 1970 (repealed by the Housing Developers (Control and Licensing) Regulations 1982) r 12(1)
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989 Schedule G
Limitation Act 1953 s 6, 6(1), (1)(a), (3)
Rules of Court 2012 O 14, O 14 r 1, O 14A, O 14A rr 1, 2

Appeal from: Civil Appeal No WA-12A NCvC-91–06 of 2017 (High Court, Kuala Lumpur)

Wong Chong Wah (ET Low, Wong Chun-Keat, Jeremy Low and Chan Pei Mun with him) (Cheong Wai Meng & Van Buerle) for the appellant.
Chan Chee Leong (CL Chan & Ng) for the respondents.

Zabariah Yusof JCA:

[1] The appellant, Golden Approach Sdn Bhd (defendant in the sessions court and hereinafter referred to as 'Golden Approach') appeals against the decision of the learned High Court judge in dismissing Golden Approach's appeal. The learned High Court judge had dismissed Golden Approach's appeal, and affirmed the decision of the sessions judge who had allowed summary judgment by the respondents herein (plaintiffs in the sessions court) to be entered against Golden Approach.

[2] In this judgment we will refer to the appellants as 'Golden Approach' and the respondents as 'the plaintiffs'.

BACKGROUND

[3] The undisputed facts are as stated by the plaintiffs in their written submission which, to a certain extent is reproduced herein.

[4] Pursuant to a sale and purchase agreement dated 4 August 1995 ('SPA') Lau Sen Leong (the first plaintiff) and one Lau Kim Swee, had purchased all that piece of land with vacant possession known as Plot/Lot No 0010 together with a bungalow to be erected on two pieces of land known as HS(D) BP 394, Lot No 4020 and HS(D) BP 395, Lot No 4021, both in Mukim Ulu Bernam, Daerah Batang Padang, Negeri Perak ('the property') from Golden Approach, a housing developer licensed under the Housing Development (Control and Licensing) Act 1966, at a price of RM233,600.

[5] The SPA was in the form prescribed in Schedule G to the Housing Development (Control and Licensing) Regulations 1989 as was then in operation.

[6] One of the purchasers, Lau Kim Swee ('the deceased'), passed away on 6 August 2012. The deceased's estate is now represented by Sim Kum Ying and Lau Sen Hock as joint administrators of the estate of the deceased. They are named as the second plaintiffs in the sessions court.

[7] Clause 20 of the SPA provides for the deadline for Golden Approach to hand over vacant possession of the property to the plaintiffs. It reads as follows:

> 20. Time for handing over of vacant possession
>
> (1) Vacant possession of the said Building to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement; and
>
> (2) If the Vendor fails to deliver hand over possession of the said Building, to which water and electricity supply are ready for connection to the said Building, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchaser price.

[8] It is undisputed that the delivery of vacant possession of the property was only effected on 14 March 2016. There had been a delay from 3 August 1998–14 March 2016 on the part of Golden Approach in delivering vacant possession of the same.

[9] By letters of demand dated 28 December 2016 and 11 January 2017, the plaintiffs vide their solicitors, Messrs CL Chan & Ng claimed for liquidated damages in the sum of RM411,456 against Golden Approach.

[10] Golden Approach vide its solicitors Messrs Cheong Wai Meng & Van Buerle's letter dated 26 January 2017, refused to pay the liquidated damages claimed by the plaintiffs and contended that the plaintiffs' claim was time-barred.

THE ISSUE

[11] The cause of action is premised on breach of contract, namely the SPA. The bone of contention between the plaintiffs and Golden Approach is the date of the accrual of the right to sue for the liquidated and ascertained damages.

[12] It is the plaintiffs' case that the cause of action only accrued at the time when the plaintiffs took over vacant possession of the property, namely on 14 March 2016. That was when time starts to run. In this respect, the plaintiffs submitted that the principle in the Privy Council case of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 applies.

[13] Whilst Golden Approach's stand is that the cause of action accrued at the time when the breach occurred, namely 3 August 2004. Therefore, by filing the suit against Golden Approach on 15 March 2017, clearly the plaintiffs' action is out of time pursuant to s 6(1) of the Limitation Act 1953.

THE SESSIONS COURT PROCEEDINGS

[14] It is undisputed that the plaintiffs filed their claim in the sessions court on 15 March 2016 against Golden Approach for liquidated damages in the sum of RM411,456 pursuant to cl 20 of the SPA.

[15] Golden Approach in its defence, pleaded that the plaintiffs' claim was barred by s 6(1) of the Limitation Act 1953. It was Golden Approach's contention that as the plaintiffs' claim was founded upon a breach of cl 20 of the SPA, their cause of action accrued on the day following the time limited for delivery of vacant possession of the property, namely on 4 August 1998 which expired on 3 August 2004 by virtue of s 6(1) of the Limitation Act 1953. The plaintiffs only filed their writ of summons and statement of claim on 3 April 2017, which is more than 12 years out of time.

[16] The plaintiffs' stand is that their action accrued from the day when they were given vacant possession of the property on 14 March 2016.

[17] On 4 April 2017, the plaintiffs filed an application for summary judgment under O 14 r 1 of the Rules of Court 2012 in the sessions court ('the ROC 2012').

[18] Golden Approach in resisting the O 14 application, contended that the plaintiffs' claim was barred by limitation by virtue of s 6(1)(a) of the Limitation Act 1953.

[19] On 31 May 2017, the sessions court judge allowed the plaintiffs' application to enter summary judgment against Golden Approach for the sum of RM411,456 with costs of RM3,000. The sessions court held, inter alia, that:

(a) in determining when the right to sue accrued, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188; [1996] 2 CLJ 753 ('Insun') was distinguished and the principle stated in the case of *Loh Wai Lian v*

SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 ('Loh Wai Lian') was relevant and applicable in this case;

(b) the court took judicial notice of cl 23(3) in Schedule G to the Housing Development (Control and Licensing) Regulations 1989 which is in operation and ought to be read into the existing SPA. The said cl 23(3) expressly provides that any cause of action to claim liquidated damages shall be paid by the vendor to the plaintiffs immediately upon the date the purchaser takes vacant possession of the property;

(c) hence, the plaintiffs' claim was not barred by the statutory limitation under s 6(3) of the Limitation Act 1953 as time started to run on the date the plaintiffs took vacant possession of the property which was on 14 March 2016; and

(d) in the premise, summary judgment was entered against Golden Approach, with costs of RM3,000.

[20] Dissatisfied with the sessions court's judgment, Golden Approach on 2 June 2017 filed an appeal in the High Court.

DECISION OF THE HIGH COURT

[21] The appeal was heard on 9 October 2017 by the High Court and the same was dismissed.

[22] In dismissing the appeal, the High Court affirmed the decision of the sessions court and held in particular:

(a) *Insun*'s case is inapplicable and ought to be distinguished because of the following differences:

(i) cl 20 (2) of the SPA in our present case has an addendum of the words 'to deliver hand over possession' whereas cl 18(2) of the SPA in the *Insun*'s case used the phrase 'to deliver vacant possession'. There is another addendum in cl 20(2) of the SPA in our case which is, 'to which water and electricity supply are ready for connection to the said Building' which was absent in cl 18(2) of the SPA in the *Insun*'s case;

(ii) unlike *Insun*'s case, the plaintiffs in the instant appeal vigorously pursued Golden Approach to hand deliver and hand over vacant possession of the property as soon as the time stipulated for delivery of vacant possession has been reached; and

(iii) if the plaintiffs filed their claim against Golden Approach at the time of breach on 4 August 1998, the liquidated damages cannot be

ascertained, until the building has been completed and possession can be delivered. A

[23] The learned High Court judge held that, in applying cl 23(3) of Schedule G to the Housing Development (Control and Licensing) Regulations 1989 into cll 20(1) and (2) of the SPA, the sessions judge had misdirected himself as the said cl 23(3) was not enforced yet at the time when the SPA was executed. The sessions judge erred when he took judicial notice of cl 23(3) of the said Schedule G to the Housing Development (Control and Licensing) Regulations 1989. We noted that this is no longer an issue before us, hence we do not address it in our judgment. B C

[24] In any event, the learned High Court judge found that Golden Approach has failed to raise triable issues in its defence, the appeal was accordingly dismissed by the High Court. D

OUR DECISION

[25] Golden Approach had not disputed on two salient points, namely: E

(a) the period of delay by Golden Approach in handing over vacant possession of the property to the plaintiffs from 4 August 1998–14 March 2016 (6,429 days); and

(b) the computation that Golden Approach, as the developer, was liable to pay to the plaintiffs' as the purchasers, the liquidated damages as provided by the sale and purchase agreement dated 4 August 1995 ie purchase price of RM233,600 x 10% annual interest x 6419 days (from 4 August 1998 till 14 March 2016) = RM411,456 and cost of RM3,000. F

G

[26] The issue only revolves on one pertinent issue, namely, whether the plaintiff's claim against the defendant, was barred by s 6(1) of the Limitation Act 1953.

[27] The sessions judge and the learned High Court judge had distinguished *Insun*'s case with the present case and held that *Insun*'s determination of when the cause of action accrued is inapplicable due to the differences in the relevant clauses in the SPA with regards to delivery of vacant possession. We, however disagreed with the findings of both courts as to when the action accrued. It is our view that the principle in determining when the cause of action accrued as set out in *Insun*'s case is applicable. These are our reasons. H I

[28] The Federal Court case of *Insun* was similar and on all fours with our present appeal. It was an appeal from the judgment of the High Court,

ordering that judgment be entered in favour of the plaintiff, the purchaser under a sale and purchase agreement dated 12 December 1984 of a property to be erected by the defendant, Insun Development Sdn Bhd, the vendor. The agreement was in the form prescribed in the schedule to the Housing Developers (Control and Licensing) Regulations 1982 ('the 1982 Regulations').

The purchaser's claim was for a declaration as to entitlement to agreed liquidated damages for breach of contract, calculated at the rate of 10%pa on a daily basis on the purchase price of RM49,725 from 12 December 1986 to date of delivery of possession of the property. Alternatively, the purchaser's claim was for a declaration as to entitlement to liquidated damages as aforesaid, under the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder, to wit, the 1982 Regulations. The case was decided on similar issues as our present appeal, namely whether the purchaser's right to sue for the agreed liquidated damages accrued the day after the time limited under the agreement for delivery of vacant possession or it accrued upon actual delivery of vacant possession. The learned judge held that the purchaser was entitled to the primary declaration prayed for and accordingly entered judgment in his favour.

What is pertinent is the provision of cl 18 of the SPA in *Insun* which reads:

> 18(1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

It was undisputed that the property was not completed and available for delivery until 25 March 1994. There has been a delay from 12 December 1986–25 April 1994, on the part of the vendor in delivering vacant possession of the same.

A demand for agreed liquidated damages by the purchaser was refused by the vendor, which resulted in the former filing an originating summons for the declarations aforesaid and for consequential reliefs.

It was the vendor's stand that the purchaser's claim was barred by s 6(1) of the Limitation Act 1953. It was contended that as the purchaser's claim was premised upon a breach of contract, namely cl 18 of the SPA, his cause of action accrued on the day following the time limited under the agreement for completion and delivery of vacant possession of the house. Based on this ground, the purchaser had commenced the proceedings against the vendor more than seven months out of time and his claim was therefore barred by limitation.

In giving judgment for the purchaser, the judge relied heavily on the Privy Council decision in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1. The point of central importance is whether *Insun*'s case is governed by the judgment of the Privy Council in *Loh Wai Lian*, as the judge thought.

In *Loh Wai Lian*'s case, by a contract in writing dated and executed on 18 March 1974, the purchaser had agreed to purchase from the defendant/developer — a corporate licensed housing developer, a shophouse to be constructed by the developer. Clause 17 of the SPA provided as follows:

> Subject to clause 32 hereof and/or to any extension, or extensions of time as may be allowed by the controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

The applicable legislation in *Loh Wai Lian* was the Housing Developers (Control and Licensing) Rules 1970 ('the 1970 Rules') r 12(1) of which provided:

> Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely: ...

There were then set out 21 matters which were required to be incorporated in the contract of sale, the relevant ones for purposes of the case were as follows:

> (o) Provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall be not later than 18 months after the date of signing of the contract of sale ...
>
> (r) Provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale ...

What is pertinent to take note is that cl 17 provided a formula for the computation of the agreed liquidated damages which defined not only its terminus a quo (its opening date) but also its terminus ad quem (its closing date).

In *Loh Wai Lian*, there had been a delay in the completion of the shophouse and it was in fact completed only on 7 November 1977. The purchaser demanded for liquidated damages for the late delivery, to which the vendor refused which resulted in the purchaser commencing an action against the vendor for liquidated damages for breach of contract. The purchaser succeeded in its O 14

application before the SAR. On appeal before the judge in chambers, the developer contended that the purchaser's claim was barred by limitation by virtue of s 6(1) of the Limitation Act 1953. The learned judge upheld the contention and set aside the summary judgment. The purchaser further appealed to the Federal Court where the Federal Court dismissed the appeal and held that the claim by the purchaser was statute barred. The purchaser appealed to The Privy Council which held that:

> (2) the only sensible construction of cl 17 is that it imposes an obligation to pay in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for;

The Privy Council restored the order of the SAR.

[29] Coming back to our present appeal, was the sessions judge and the learned High Court judge correct in distinguishing *Insun*'s case due to cl 20 (2) of the SPA which provides for the following addendum which was markedly absent in the SPA in *Insun*'s case:

(a) 'to deliver hand over possession'; and

(b) 'to which water and electricity supply are ready for connection to the said Building'.

Both of the SPAs in *Insun* and our present appeal are in the form as prescribed by the Housing Developers (Control and Licensing) Regulations which are enforced at the material time. In *Insun*'s case it was the Housing Developers (Control and Licensing) Regulations 1982, whilst in the present appeal it is the Housing Development (Control and Licensing) Regulations 1989.

[30] We agreed with the submission by Golden Approach that the sessions judge and the learned High Court judge had erred when they had distinguished the SPA in the present appeal with *Insun*'s case based on the presence of the addendum in cl 20(2) of the SPA which was absent in cl 18(2) of the SPA in the *Insun*'s case and submitted that the principle as laid down in *Loh Wai Lian* is applicable.

In our view, that addendum was not material and neither was it crucial to the extent that it affected or altered the meaning of the clause in the SPA concerned. What needs to be considered is the obvious and most material difference between the two SPAs. As in *Insun*'s case, Edgar Joseph Jr, FCJ addressed what ought to be considered in determining the date of the accrual of the right to sue for damages. In the process His Lordship had distinguished the provisions of the SPA in *Loh Wai Lian* with the one in *Insun*. His Lordship explicitly in his judgment said as follows:

It is clear law, that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1970] 1 MLJ 32 at p 34; *Reeves v Butcher* [1891] 2 QB 509 at p 511; *Gibbs v Guild* [1881] 8 QBD 296 at p 302). *But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in Loh Wai Lian.*

In the present context, we have to consider whether there is any, and if so, *what material difference* between the contract of sale in *Loh Wai Lian* and the agreement here.

The obvious difference between the contract of sale in Loh Wai Lian and the agreement here, which we consider to be most material, is this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the terminus a quo (the opening date) but also the terminus ad quem (the closing date), which was the date of actual completion and delivery, of possession, whereas under the latter, although there is, by cl 18(2), also a formula for the calculation of liquidated damages, it only specifies the terminus a quo but not the terminus ad quem. In our view, this difference is a matter of critical substance.

It is obvious from the judgment of the Privy Council in *Loh Wai Lian*, that but for the unusual language of cl 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delays, by defining not merely the terminus a quo (the opening date) required under r 12(1)(r) of the 1970 Rules but also the terminus ad quem (the closing date) — not required under r 12(1)(r) — the case would have been differently decided for Their Lordships said this:

If the question is asked 'in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?', the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.

In our view, for the reasons stated, *Loh Wai Lian* is, therefore, readily distinguishable from the present case, and accordingly, the judge was, with respect, wrong in holding that it was of decisive importance to the question which arose for decision.

It follows, therefore, that our answer to the crucial question aforesaid is; because the agreement by cl 18(2) had provided for a formula for the calculation of liquidated damages which defined the terminus a quo (the opening date) but *not* the terminus ad quem (the closing date), the purchaser's right of action for damages for breach of contract, following the general rule, accrued on the date of the breach, which in this case was the day after the time limited under cl 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986. Accordingly, the purchaser having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser's claim was statute-barred under the provisions of s 6(1) of the Limitation Act 1953.

[31] Thus, applying the principle as enunciated by the Federal Court in *Insun*'s case, the alleged difference in the addendum in the SPA in our present appeal and the SPA in *Insun*'s case, (as stated by the sessions judge and the learned High Court judge), is not a matter of critical substance which should be considered by the learned judge in determining when the cause of action accrued. Hence the sessions judge and the learned High Court judge had considered irrelevant considerations in determining the date of the accrual of the right to sue for damages.

Unlike *Loh Wai Lian*, which is distinguishable with our present appeal, namely that, in *Loh Wai Lian*, cl 17 of the SPA had provided a formula for the computation of damages payable by the developer to the buyer for delays, by defining not merely the terminus a quo (the opening date) required under r 12(1)(r) of the 1970 Rules but also the terminus ad quem (the closing date). Whereas in our present appeal, the SPA by cl 18(2) had provided for a formula for the calculation of liquidated damages which defined the terminus a quo (the opening date) but *not* the terminus ad quem (the closing date), the plaintiffs' right of action for damages for breach of contract, following the general rule, accrued on the date of the breach. In our case, it was the day after the time limited under cl 18(2) for the delivery of vacant possession, namely on 3 August 2004. Accordingly, the plaintiff having commenced the suit against Golden Approach only on 15 March 2017, was certainly out of time. Inevitably, the plaintiffs' claim was statute-barred under s 6(1) of the Limitation Act 1953.

[32] The second ground relied upon by the learned High Court judge to distinguish *Insun* and our present appeal is that the purchasers in our present appeal had pursued vigorously against Golden Approach to hand deliver and hand over vacant possession of the property. The purchasers submitted that they had conformed with s 56(3) of the Contracts Act 1950 which provides that:

> 56(3) If, *in case of a contract voidable on account of the promisor's failure to perform his promise* at the time agreed, *the promise accepts performance* of the promise on any time other than that agreed, *the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the acceptance, he gives notice to the promisor of his intention to do so.*

This section, in our view is immaterial and ought not be a basis of distinguishing the case with *Insun* and neither could it be a basis to extend the time as stipulated under the Limitation Act 1953.

[33] Thirdly, the plaintiffs submitted that they would not be able to calculate liquidated damages if they proceeded in filing their claim at the time of breach on 4 August 1998. In other words, the contention of the plaintiffs is that the cause of action would not be complete until the property was actually

completed and vacant possession given to the plaintiffs. However, we are of the view that it would not be correct to say that the cause of action would shift because they could not calculate liquidated damages if they were to file their claim at the time of breach, as there was no delivery at the time of the breach. The issue on hand is when the cause of action accrued. It ought not be confused with the reliefs claimed.

The plaintiffs failed to see that this precise and specific issue has already been addressed by the Federal Court in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1984] 2 MLJ 280 whereby Mohamed Azmi FCJ held at p 283 para C:

> Such a proposition would in fact mean that if the respondents did not complete the shophouse, accrual of cause of action could be postponed indefinitely. We do not think that the proviso to cl 17 of the agreement could have that effect on the Limitation Ordinance in an action founded on contract. A distinction must clearly recognised between a cause of action and the relief claimed. The date of completion of the shophouse was only necessary to quantify the maximum relief under cl 17 which could be done subsequently by evidence. It could not constitute an impediment to the cause of action being complete. The breach had occurred on 18 September 1975 giving rise to a complete cause of action, and the accrual of cause of action would not be postponed by temporary lack of evidence pertaining to maximum relief claimable resulting from such breach irrespective of whether the damages claimed were liquidated or unliquidated. In the circumstances of the present case, we would not agree to the proposition that the cause of action was not complete until the shophouse was completed.

What is pertinent is to take note of what the Federal Court further held in this respect in *Loh Wai Lian* at p 281:

> (2) the appellant was wrong in thinking that her writ could not be issued until November 1977 because the liquidated damages could not be quantified. The agreement provided that such damages were to be calculated on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Damages could therefore be ascertained under the agreement and in this case if the statement of claim had been filed on or before September 17, 1981, no court would have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable was not quantified.

[34] It is also to be noted that *Insun*'s case is a Federal Court case, which is the highest court in the land and binding on all courts. The High Court is bound by the doctrine of stare decisis to follow the principle as enunciated in *Insun*. We could do no better than what had already been stated in the judgment of the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 which said:

> It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *Public*

Prosecutor v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276; [1980] 1 LNS 58, Mr Justice Chang Min Tat had occasion to restate the doctrine in words which are poignantly clear when he said:

> It is ... necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.
>
> 3. Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules. as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[35] Therefore based on the aforesaid, *Insun*'s case applies and the plaintiffs' right of action to claim for liquidated and ascertained damages accrued on the date of the breach, namely the day after the time limited under cl 20(2) of the SPA of delivery of vacant possession on 4 August 1998.

[36] As the plaintiffs' cause of action was founded on contract, the limitation period is governed by s 6 of the Limitation Act 1953, which is six years from the date of the breach. The last date for the plaintiffs to bring an action against Golden Approach for the breach of cl 20(2) of the SPA is 3 August 2004. Clearly, the action herein was filed 15 March 2017 which is outside the limitation period as prescribed under s 6(1) of the LA. Hence, the plaintiffs' claim is out of time.

[37] For the reasons as aforesaid, the learned judge had erred in distinguishing *Insun*'s case with the present appeal. The present SPA is similar to the one in *Insun*'s case. Therefore, as limitation has set in, the plaintiffs are not entitled to the summary judgment. The summary judgment is therefore set aside. The appeal is allowed with costs of RM10,000 to the appellant subject to allocatur and deposit refunded.

[38] Counsel for Golden Approach urged this court to invoke the powers under O 14A of the ROC 2012 to strike out the claim as there is nothing left for this court to remit the case back to High Court.

[39] We agree with the contention of learned counsel for Golden Approach. In view that we have allowed the appeal, and the claim is barred by limitation, there is nothing left for the matter to be remitted back to High Court. We have decided on the question of law, namely on the limitation issue. We therefore invoke the powers under O14A and order that the claim be struck out (O 14A r 1 and O 14A r 2 of the ROC 2012 referred).

Summary judgment set aside; appeal allowed with costs of RM10,000; claim struck out.

Reported by Addibah Adnan